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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION - RIVERSIDE COURTHOUSE

WOODARD INVESTMENTS, INC. an Oregon corporation, and KEITH WOODARD, an individual,

Plaintiffs,

vs.

NATIONAL VENDING SYSTEMS, INC., a California corporation; MAD DOG ENERGY PRODUCTS, INC., a California corporation; RICHARD BLACK, an individual; GARY LUCKNER, an individual; MICHAEL STEIN, an individual; MEL HENDRIX, an individual; and RICHARD ALLEN, an individual,

Defendants.

Case No. EDCV 08-01805 SGL (MANx)

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO SET ASIDE RIGHT TO ATTACH ORDERS, QUASH WRITS OF ATTACHMENT AND RELEASE PROPERTY LEVIED UPON

[Memorandum Of Points And Authorities Attached Hereto, Supplemental Declaration Of Richard Allen Black And Objections To And Motion To Strike Portions Of Plaintiffs' Opposition Evidence Submitted Concurrently Herewith]

Date: August 18, 2009
Time: 10:00 a.m.
Courtroom: 580
Roybal Federal Bldg.
255 E. Temple St.
Los Angeles, CA 90012

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs' Opposition to Defendants' "Motion To Set Aside Attachment, Etc." (the "Motion") actually underscores why the attachment obtained by Plaintiffs (the "Attachment") should be set aside.

Fundamentally, in order to have a proper attachment, a plaintiff needs to establish, *inter alia*, the probable validity of its breach of contract claim. That has not been done here.

To the contrary, as demonstrated in the Motion and impliedly confirmed in the Opposition, there has been no breach of any term of the Master Distributor Agreement by Defendants whatsoever, and the so called terms which Plaintiffs ask the Court to "imply" into that contract are, in fact, contradicted by the express terms of the Master Distributor Agreement itself.

Thus, in a misguided attempt to try to establish the necessary breach of contract claim, Plaintiffs are actually asking this Court to ignore the express terms of that contract, and, instead, to improperly rely on parol evidence which is wholly barred by the express integration clause of that contract.

In essence, Plaintiffs are wrongly asking this Court to re-write the express terms of the Master Distributor Agreement.

Among other things, the Opposition glaringly fails to refute all of the following salient points evidenced in the Motion:

- The express no earnings claims and no buy-back clauses of the Master Distributor Agreement;
- The express integration clause of the Master Distributor Agreement;

- The parol evidence nature and inadmissibility of the vast majority of Plaintiffs' supposed evidence; and
- Plaintiffs' rejection of any purported "offer to sell" which might arguably qualify as a SAMP and, instead, Plaintiffs' entry into multiple written contracts - all in excess of $50,000 which clearly do not qualify as a SAMP.

For all of the reasons detailed below, and in the Motion, Plaintiffs have failed to show the probable validity of their contract claims and the Motion should be granted.[1]

II. ARGUMENT

A. Plaintiffs Have Failed To Establish The "Probable Validity" Of Their Breach Of Contract Claims - All Of Which Are Based On Alleged "False Validations" Ante-Dating The Master Distributor Agreement.

Plaintiffs attempt to justify the Attachment by arguing that Defendants supposedly breached the covenant of good faith and fair dealing implied in the Master Distributor Agreement because Plaintiffs supposedly relied on a number of alleged "false validations". This argument is without any merit.

1. The Master Distributor Agreement Expressly States That There Were No Earnings Claims And Any Prior Representations Were Of No Effect.

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[1] Additionally, as set forth in the Motion, in light of Plaintiffs' complete failure to account for their sales of machines and products, or profits therefrom, and continued role in distributing the subject products, their alleged damages are not "fixed or readily ascertainable" as required by California Code of Civil Procedure section 483.010.

Furthermore, Plaintiffs have offered nothing but their own self-serving denials to refute that they are pursuing the Attachment for the improper purpose of putting Defendants out of business - as they threatened to do both verbally and in writing.

Although the Opposition completely fails to refute the express written language of the Master Distributor Agreement upon which Plaintiffs' Attachment is based, the fact remains that the Master Distributor Agreement contains very express language limiting Plaintiffs' ability to claim or justifiably rely on any prior representations.

Among other things, the Master Distributor Agreement states in bold-faced type that:

> "**11. No Earnings Claims. It is acknowledged that Supplier has made no guarantees, or estimates, of Master Distributor's Earnings, or ranges of earnings.**" [Bold in original, other emph. added; Master Distributor Agreement, p. 3, ¶ 11.]

Similarly, the Master Distributor Agreement states that it is the "sole and only Agreement of the parties" and that:

> "Any prior agreements, promises, negotiations, or representations concerning its subject matter not expressly set forth in this Agreement are of no force or effect." [Emph. added.]

Now, in complete conflict with such specific language, Plaintiffs try to claim that they supposedly relied on prior representations and "false validations" ante-dating the Master Distributor Agreement.

Specifically, the Opposition asserts that Mr. Stein, Mr. Hendrix and Mr. Black allegedly "lied" about "their supposed successes" which "convinced Woodard to invest in a distributorship of his own". [Emph. added; Opposition, p. 9, line 25 to p. 10, line 8.]

Then, in a nonsensical attempt to spin both facts and law, the Opposition states that these prior "lies" frustrated "the very purpose for which Woodard invested in the business opportunity" and, therefore, allegedly "do not implicate the parol evidence rule, and are not hearsay". [Opposition, p. 12, lines 18-21.]

Plaintiffs are seriously mistaken. The Master Distributor Agreement - signed by Plaintiffs and governing their relationship - expressly states that there were no earnings representations whatsoever. Yet, Plaintiffs' breach of contract claims are entirely based on the alleged existence of such prior "false validations" and "lies" regarding earnings.

Spin it as they may, however, as a matter law any evidence of an alleged false promise relating to a matter covered in the written Master Distributor Agreement which directly contradicts the terms thereof is parol evidence and is inadmissible.[2]

2. Plaintiffs' "Reasonable Expectations" Could Not Have Been "Frustrated" As Alleged.

Plaintiffs' claim that their "reasonable expectations" were supposedly frustrated by "false validations" is also patently

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[2] Moreover, any supposed support of such evidence (*i.e.*, the Biethman Dec., Koepsell Dec., Rogers Dec. and Vitt Dec.) is also inadmissible hearsay and/or entirely irrelevant.

As set forth in Traumann v. Southland Corporation, 842 F.Supp. 386, 391 (1993) (*citing*, Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 484, 261 Cal.Rptr. 735):

> "Under California Law, 'if the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible.'" [Emph. added.]

unjustifiable for at least the following reasons:

- The alleged "false validations" purportedly occurred in September 2007 - three months prior to Plaintiffs' executing the Master Distributor Agreement [Supp. Woodard Dec., ¶'s 5-6];
- The alleged "false validations" occurred before Plaintiffs entered into the First Purchase Agreement and the Second Purchase Agreement for the master distributor rights to Oregon and Washington - each of which preceded the December 2007 Master Distributor Agreement;[3]
- Plaintiffs terminated the Master Distributor Agreement by their July 11, 2008 letter, proclaiming "Let this correspondence serve as Woodard's election to cancel and rescind the Agreement" [Emph. added; Black Dec., ¶ 46; Plaintiffs' Request for Judicial Notice, Court Document "76", p. 139 (*i.e.*, Exh. "9" to Attachment Papers), third paragraph]; and
- Plaintiffs allegedly did not discover "Mr. Black's deception" and "problems with Vroom's and Mad Dog's business relationship" until September 2008 - a full two months after their July 2008 termination of the Master Distributor Agreement. [Supp. Woodard Dec., ¶ 4, p. 1, line 27 to p. 2, line 2; ¶ 15 and ¶ 16, p. 5, lines 14 to 17].[4]

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[3] Each of these agreements expressly stated that there were "no estimates and/or guarantee of earnings", "no buy-back" protection, and that each agreement "supersedes any previous agreement, written and oral and is the entire agreement between the Purchaser and Seller". [Defendants' Exh., "1", ¶'s 9 and 10, and signature page; Defendants' Exh. "4", ¶'s 9 and 10, and signature page.]

[4] In this regard, Mr. Woodard declares "I was not aware of Mr. Black's deception until September, 2008" [Supp. Woodard Dec., ¶ 4, lines 27-28] and "I did not even know that there were problems with Vroom's and Mad Dog's business relationship until September 12, 2008". [Emph. added; Supp. Woodard Dec., ¶ 16, p. 5, lines 14-17.]

Thus, the alleged "false validations" could not have been reasonably relied upon with respect to entering into the Master Distributor Agreement. Nor could they have frustrated Plaintiffs' "reasonable expectations" or caused him "to question [his] ability to ethically serve as a master distributor" - the Master Distributor Agreement was already terminated!

B. Plaintiffs Have Also Failed To Show The Probable Validity Of Their Breach Of Contract Claims Based On Alleged Offers To Sell "Exclusive Territories" To Others.

Plaintiffs allege that Defendants supposedly breached the covenant of good faith and fair dealing by allegedly offering to sell to others "exclusive territories" within Plaintiffs' Oregon and Idaho exclusive Master Distributor territories. However, none of these conclusory claims withstands scrutiny.

1. Woodard Only Purchased Exclusive Master Distributor Rights To Sell Products.

Plaintiffs set up their alleged second breach of the Master Distributor claim by confusingly asserting that Plaintiffs purchased both (1) the exclusive lower-level distributor rights to place machines, and (2) the exclusive Master Distributor rights to supply the Buzz Bite Products to the lower-level distributors within the Oregon, Washington and Idaho territories. [Supp. Woodard Dec., ¶ 6; Opposition, p. 8, lines 7-16.] This statement is patently misleading.

To begin with, the Master Distributor Agreement covered only Plaintiffs' right to be the exclusive master distributor of the Buzz Bites Products in the Oregon, Washington and Idaho areas

to lower-level distributors who operated within such territories.

In this regard, paragraph 1 of the Master Distributor Agreement specifically states as follows:

> "1. Exclusive Appointment. The Supplier [*i.e.*, NVS] hereby appoints the Master Distributor [*i.e.*, Plaintiffs] as the exclusive distributor for the sale of the Products within the following territory: The States of Idaho, Oregon, and Washington. (Hereinafter the "Territory") For so long as this Agreement is in operation, the Supplier shall not appoint any other or different person, firm, corporation or entity to sell the Products in the Territory." [Emph. added; Defendants' Exh. "7", Master Distributor Agreement, p. 1, ¶ 1.]

As defined in Exhibit "A" to the Master Distributor Agreement, the "Products" are only the "Buzz Bites" and "Foosh Mints" candies - not the machines from which they are sold.

While Plaintiffs also purchased machines to place themselves, they did not purchase any exclusive rights to be the sole or exclusive machine operators in the subject territories.

To the contrary, the Master Distributor Agreement expressly contemplates the existence of other lower-level distributors who would become the customers of Plaintiffs.[5]

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[5] For example, paragraph 5(b) of the Master Distributor Agreement requires that Plaintiffs "must maintain inventory adequate to supply all sub-distributors in the Master Distributor's Territory". Similarly, paragraph 10 provides that "To assist the Master Distributor, the Supplier shall identify potential customers who are in the Master Distributor's Territory and are known to the Supplier", so Plaintiffs could resell the product at a $0.03 per candy profit. [Emph.add.; ¶ 8.] This is exactly what Defendants did - they referred the sub-distributors within the subject

Indeed, the Opposition concedes as much when it states that: "In Woodard's case, for example, Woodard, as a master distributor, had purchased the exclusive right to supply Buzz Bites to all of the Buzz Bites distributors in Oregon, Washington and Idaho - his exclusive territories". [Emph. Added.; Opp., p. 8, lines 13-16.][6]

2. Plaintiffs' Claim That Defendants Purportedly Offered To Sell The Same Exclusive Territories Is Not Supported By Admissible Evidence.

Plaintiffs claim that, in April 2008, some unnamed and unidentified woman telephoned Mr. Woodard supposedly stating that Defendants had offered to sell her "an 'exclusive' territory in Oregon". From this hearsay statement, Mr. Woodard purportedly inferred that "Mad Dog was selling the same 'exclusive territories in Oregon to multiple distributors". [Opposition, p. 8, lines 17-23; Woodard Dec., ¶'s 30-31.][7]

As set forth in the Motion, the purported statements by this unidentified woman are inadmissible hearsay. Indeed, the inference supposedly made therefrom is necessarily based on

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territories to Plaintiffs so that Plaintiffs could then exclusively supply Products to them to stock their machines. [Black Dec., ¶ 43; Defendants' Exh. 14.]

[6] The Master Distributor Agreement contains no representations or covenants that Defendants were the only ones authorized to sell vending machines from which the subject products could be sold or that Defendants were the only ones selling, or authorized to sell, sub-distributor territories for placement of such machines. Nor can such terms be implied.

[7] Aside from the fact that the Opposition is confusingly vague as to what kind of "exclusive territory" was supposedly offered, it certainly was not Plaintiffs' exclusive "Master Distributor" territory for Products governed by the Master Distributor Agreement. Rather, the allegation must refer to a sub-distributor territory for machine placement because Mr. Woodard declared that Mr. Luckner "left a voicemail message with me notifying me that a woman in my territory of Oregon would be phoning me about investing in the Buzz Bites Opportunity". [Emph. add.; Woodard Dec., ¶ 30.]

multiple hearsay, lacks foundation, and is inadmissible.

It is particularly telling as to the unreliability of such purported statements that Plaintiffs have not produced with their Opposition any declaration by this woman of her supposed discussions with Defendants or anyone else purportedly previously owning the same territory offered to her.[8]

C. The SAMP Law Does Not "Apply" In This Case Nor Does It "Imply" Any Additional Terms Into The Master Distributor Agreement.

Plaintiffs argue that Defendants breached the implied covenant of good faith and fair dealing by allegedly breaching

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[8] Plaintiffs also make an unsupported leap of logic that Mr. Black's alleged statement that "Mad Dog could not control third parties from selling into my Exclusive Territory" is supposedly an "adoptive admission" that Defendants were actually wrongfully selling the same "exclusive territories" to multiple sub-distributors, and breaching the implied covenant of good faith and fair dealing in the Master Distributor Agreement.

This is nonsense. Mr. Black's alleged statement, at best, merely reflects the industry reality that other companies were selling the vending machines from which the Buzz Bite Products could be sold and Mad Dog could not control other companies.

No matter who the sub-distributors bought their machines from, however, they still had to buy the Products themselves from Plaintiffs - this is hardly a breach of the implied covenant of good faith and fair dealing, much less an adoptive admission that the same sub-distributor territories were being sold to multiple people.

Moreover, the Biethman Dec. does nothing to support Plaintiffs' claims in this regard. Mrs. Biethman admittedly purchased her machines from American Vending Systems - not from Defendants. No matter who raised the concept of her purchasing master distributor rights to Idaho, she expressly acknowledges that Mr. Black "explained that another distributor named "Keith" [*i.e.*, Mr. Woodard] currently owned the exclusive [Master Distributor] right to Idaho, but that he would be more than happy to contact "Keith" and offer to trade him the Idaho territory for territories in Northern California or elsewhere". [Biethman Dec., ¶ 4.]

Obviously, even assuming, *arguendo*, that this conversation took place, there is nothing in it that could be construed as a breach of the Master Distributor Agreement or its implied covenant.

additional terms supposedly "implied" by California's Seller Assisted Marketing Plan ("SAMP") law. This argument has no merit.

To begin with, Plaintiffs are not suing on any "offer to sell" a SAMP, but on an actual executed Master Distributor Agreement that required an "initial payment" of $300,000 - well in excess of the $50,000 definitional limit for a SAMP.

Plaintiffs disingenuously ignore the undisputed fact that they did not accept any "offer" contained in the September 2007 Marketing Materials that possibly could be construed as a SAMP.[9]

Instead, Plaintiffs entered into - not just one, but three - written agreements over a three month period.

In this regard, Plaintiffs entered into: (1) the First Purchase Agreement requiring an "initial payment" of $96,480 for Oregon; (2) the Second Purchase Agreement requiring an "initial payment" of $150,000 for Washington; and (3) the Master Distributor Agreement requiring an initial payment of $300,000 for the Oregon, Washington and Idaho territories and superseded all prior agreements. [Defendants' Exhs. "1", "4" and "7".]

Thus, even if, *arguendo*, the original Marketing Materials included an "offer to sell" which arguably could qualify as a SAMP, Plaintiffs clearly rejected such offer and such rejected offer is not the subject of this lawsuit. Rather, Plaintiffs chose to enter into multiple agreements that, as a matter of law, were not SAMPs because they required initial payments greater than the definitional maximum of $50,000.[10]

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[9] While Plaintiffs focus solely on the single definitional element of "offer to sell", they ignore the other definitional element that a SAMP "requires an initial cash payment of less than fifty thousand dollars ($50,000)". *See*, Civil Code § 1812.201(a).

[10] Moreover, even if, *arguendo*, the First Purchase Agreement

Clearly, the SAMP law does not apply and certainly does not "imply" any additional terms into the Master Distributor Agreement.

D. The Washington Business Opportunity Law Also Does Not "Apply" And Does Not "Imply" Any Additional Terms.

Notwithstanding the Opposition's concession that "Woodard did not - and does not - contend that Washington law should be applied to his claims for breach of contract and money had and received" [Opp., p. 16, lines 8-10], Plaintiffs nonsensically argue that Washington's business opportunity law supposedly does "imply" additional terms into the Master Distributor Agreement. This argument directly conflicts with the plain choice of law language contained in the Master Distributor Agreement, which states that:

> "**Governing Law; Forum** This Agreement, and any dispute arising out of or related to this Agreement, shall be construed and enforced in accordance with, and governed by, the laws of the State of California". [Emph. added.]

Thus, by the parties' express written agreement, Washington law does not "apply" to, or "imply" any terms into, the Master Distributor Agreement.

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could possibly be construed as a SAMP - which it was not - the Second Purchase Agreement and the Master Distributor Agreement would still be excluded from the SAMP law because Civil Code section 1812.201(b) states that a "'seller assisted marketing plan" shall not include: . . (9) The renewal or extension of an existing seller assisted marketing plan contract". [Emphasis added.]

E. Plaintiffs' Money Had And Received Claim Also Lacks Any Probable Validity.

Plaintiffs argue that the Attachment was supposedly based on Plaintiffs' claim for money had and received, asserting - without any support whatsoever - that "all that remains, is for defendants to repay to Woodard the money that they fraudulently procured, as Woodard demanded on June 11, 2008".

Of course, the Master Distributor Agreement did not require Defendants to pay any sum to Plaintiffs.

To the contrary, it contained a very express acknowledgement that there was "no buy-back" or "secured investment arrangement" which would serve to protect Plaintiffs from any business losses. [Defendants' Exh. "7", p. 3, ¶ 12.] Defendants never agreed to be guarantors of Plaintiffs' business, and there was never any requirement for Defendants to pay any sum to Plaintiffs.

III. CONCLUSION

For all of the foregoing reasons, and those set forth in the Motion, Defendants respectfully request that the Court grant the Motion in its entirety.

DATED: August 11, 2009

Respectfully Submitted,

SHIELDS LAW OFFICES

By: _____
Jeffrey W. Shields
Rick A. Varner
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, the undersigned, say: I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 1920 Main Street, Suite 1080, Irvine, California 92614.

I served the foregoing documents described as:

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO SET ASIDE RIGHT TO ATTACH ORDERS, QUASH WRITS OF ATTACHMENT AND RELEASE PROPERTY LEVIED UPON

on the interested parties in this action in the following manners:

VIA ELECTRONIC ACCESS:

I hereby certify that on **August 11, 2009**, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following:

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VIA OVERNIGHT EXPRESS MAIL

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Executed on **August 11, 2009** at Irvine, California.

RICK A. VARNER

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